



# CITY OF NEW YORK CONFLICTS OF INTEREST BOARD

2 Lafayette Street, Suite 1010  
New York, New York 10007  
(212) 442-1400

Fax: (212) 442-1407 TDD: (212) 442-1443

Steven B. Rosenfeld  
*Chair/Board Member*

Monica Blum  
*Board Member*

Angela Mariana Freyre  
*Board Member*

Andrew Irving  
*Board Member*

Jane W. Parver  
*Board Member*

Mark Davies  
*Executive Director*

Wayne G. Hawley  
*Deputy Executive Director  
& General Counsel*

Astrid B. Gloade  
*Director of Enforcement*

Ute O'Malley  
*Director of  
Administration*

Felicia A. Mennin  
*Director of Financial  
Disclosure & Litigation  
Counsel*

Christopher M. Lall  
*Director of Information  
Technology*

Joel A. Rogers  
*Director of Training &  
Education*

## **Salary Supplements**

Charter Sections: 2604(b)(2), (b)(4), (b)(13)  
2604(e)

Opinions Cited: 92-34, 99-4, 2003-4

## **Advisory Opinion No. 2005-1**

In recent months, several City elected and appointed officials have requested opinions from the Conflicts of Interest Board (the "Board") as to whether, consistent with the conflicts of interest provisions of Chapter 68 of the City Charter, members of their staffs may receive a portion of their compensation in the form of payments from not-for-profit organizations. These payments typically come from not-for-profit organizations closely affiliated with the employees' City offices or agencies, sometimes as explicit supplements to the staff members' City salaries for their regular City work and sometimes as compensation for additional or overtime services that they provide to the City or directly to the not-for-profit organizations.

For the reasons set forth herein, and consistent with such past Board Advisory Opinions as Nos. 92-34 and 99-4, the Board finds that such payments violate the prohibition of Charter Section 2604 (b)(13) against a public servant receiving payments, except from the City itself, for performing

*Visit our home page at <http://nyc.gov/ethics>*

his or her City job. However, on written application of an agency head, the Board anticipates that it will issue waivers of such restrictions in appropriate cases. The principal focus of this opinion will be a discussion of the circumstances under which such waivers will be granted.

### Background

In recent years, the Board has considered the question of fundraising by City officials for private support of City programs, necessitated by dwindling City resources. In Advisory Opinion No. 2003-4, the Board addressed fundraising for the benefit of not-for-profit corporations affiliated with City agencies and offices, created for the express purpose of filling gaps in government funding and thereby sustaining many important City services and programs. The Board set forth the requirements and procedures governing fundraising by public servants on behalf of such not-for-profits and also established a process for pre-clearing such not-for-profits as appropriate beneficiaries of official City fundraising activities, including the criteria to be applied in that process. See Opinion No. 2003-4 at page 2. Having considered the question of fundraising for these not-for-profits, the Board is now faced with a question regarding one proposed use of the funds raised: whether such funds may be used to supplement the compensation of City employees.

More than a decade ago, the Board addressed a similar request from the Department of Parks and Recreation (“DPR”). In Advisory Opinion No. 92-34, the Board considered whether certain DPR employees might serve part-time as consultants for not-for-profits that were formed specifically to provide financial assistance to DPR, and also whether DPR employees could receive payments from such not-for-profits to supplement the City salaries for their regular DPR jobs. The not-for-profit entities involved in Opinion No. 92-34 were organizations whose specific missions were to enhance and beautify particular City parks.

In Opinion No. 92-34, the Board determined that it would not conflict with the purposes and interests of the City for DPR employees to accept compensation from such not-for-profit entities, both for consulting at the not-for-profits and as a supplement to their City salaries, and therefore granted a waiver pursuant to Charter Section 2604(e), approving such payments to the employees in question. See Opinion No. 92-34 at page 9. The Board based that waiver on a number of factors. First, it had received the written approval of the DPR Commissioner as required by Charter Section 2604(e) for any waiver of restrictions of the Conflicts of Interest Law. Second, the Board concluded that, in each case:

“1. the primary purpose of the not-for-profit in question is to provide financial assistance to the City in support of the public park system; and

2. the work to be undertaken by such employees, and for which the subsidized wages or salaries are to be paid, relates to the operation and maintenance of public parks or recreational facilities, for the benefit of the public at large.” (See Opinion No. 92-34 at 3.)

Therefore, the Board concluded, this support “benefit[ted] the public at large, rather than the not-for-profits themselves, and [was] increasingly important as government funding for parks is reduced due to budgetary constraints.” See Opinion No. 92-34 at page 8.

The current requests come from two City offices whose fundraising for affiliated not-for-profits has been pre-cleared by the Board, as provided in Advisory Opinion No. 2003-04. In the first request, the Department of Cultural Affairs (“DCA”) asks that employees of DCA’s Materials for the Arts (“MFTA”) program be permitted to receive compensation from Friends of Materials for the Arts (“FOMA”), a not-for-profit corporation formed to support MFTA. In the second request, the Public Advocate asks that an employee of the Public Advocate’s office be

permitted to receive compensation from the Fund for Public Advocacy (the "Fund"), a not-for-profit corporation formed to support the Public Advocate's Office.

In the case of MFTA, FOMA has offered to fund what is essentially overtime pay earned by DCA employees as a result of two MFTA initiatives, its Evening Shopping and Transportation Initiatives. MFTA, which operates out of a warehouse in Long Island City, collects and redistributes materials and useable refuse to schools, educational programs, and artists. Under the Evening Shopping Initiative, MFTA will offer expanded evening shopping hours at its warehouse. Through the Transportation Initiative, MFTA will send out a second truck for pickups of donated materials. Both of these initiatives will require overtime work by DCA staff, for which, it is proposed, they will be paid by FOMA at their City hourly rate. While this work could reasonably be assigned to these DCA employees as part of their regular City duties, the DCA Commissioner, in her letter supporting the request for a waiver to permit FOMA funding, notes that the overtime work is necessary to launch the new initiatives, but DCA's budget contains insufficient funds to pay for the overtime.

In the second case, the Public Advocate proposes that the Fund pay an employee of the Public Advocate's Office to assist in researching disaster preparedness in the City and to create and maintain a website containing disaster preparedness information. This work would be done in conjunction with and for use by the Public Advocate's Office, but would be done primarily in the evening after the employee's regular City hours. This project is one which the employee might reasonably have been assigned by the Public Advocate's Office. The Public Advocate has, however, provided written support for the employee receiving payment from the Fund for this additional consulting work.

### Relevant Law

Charter Section 2604(b)(13) provides that no public servant shall receive compensation, except from the City, for performing any official duty.

Charter Section 2604(e), the waiver provision, allows the Board to permit a public servant to hold a position or engage in conduct otherwise prohibited by Chapter 68 if the Board determines, after receiving written approval of the public servant's agency head, that such position or conduct does not involve a conflict with the purposes and interests of the City.

### Discussion

In Advisory Opinion No. 92-34, the Board determined that it would not conflict with the purposes and interests of the City for employees to work part-time as consultants at not-for-profit organizations that were formed to provide financial assistance for the upkeep, maintenance, and preservation of public parks, recreational centers, and other facilities under the jurisdiction of DPR. In that case, the Board noted that, "although the DPR employees receiving subsidized wages or salaries will be receiving payment from private parties, these parties are not-for-profit organizations dedicated to the support of the public park system. The payments. . . are not for the purpose of securing any private advantage but are instead intended to insure that personal services necessary to operate and maintain public parks continue uninterrupted. In making these payments, the not-for-profit organizations are acting for the benefit of the public at large, by helping to preserve the quality of the City's park system." See Opinion No. 92-34, pgs. 6-7. Advisory Opinion No. 92-34 thus stands for the proposition that even conduct that appears on its face to be clearly prohibited by Charter Section 2604(b)(13), namely, the subsidizing of a City employee's salary by a private entity, may in appropriate cases, on the written application of the agency head, be waived by the Board under the authority of Charter Section 2604(e).

In Advisory Opinion No. 99-4, the Board looked more closely at what conduct might violate Charter Section 2604(b)(13), in the context of outside teaching by City employees. The Board determined that it would be a violation of Section 2604(b)(13) for a public servant to teach, for compensation, a class regarding his own agency's new initiatives. The Board held that it would violate Section 2604(b)(13) for a public servant to accept outside compensation for any task that the public servant "might reasonably be expected to perform as part of his official duties," Id. at pg. 7, and concluded that teaching such a course could "reasonably be assigned to the public servant" as part of his or her City duties. See Opinion No. 99-4 at pg. 6. It is important to note, however, that Opinion No. 99-4 did not involve agency head approval for the outside teaching job nor a request for a Section 2604(e) waiver of the prohibition of Section 2604(b)(13).

The instant cases likewise involve proposed payments to City employees, from sources other than the City itself, for overtime work or for a "consulting" task that plainly could have been assigned to the employees as part of their regular jobs. Such payments on their face clearly do violate Charter Section 2604(b)(13), even where the source is a City-affiliated not-for-profit. Whether the Board will nevertheless grant waivers to permit such payments, as it did for DPR employees in Advisory Opinion No. 92-34, requires an analysis of the criteria for exercising the Board's waiver authority under Charter Section 2604(e). First, as mandated by that provision, the Board must receive the written approval of the agency head. Next, the Board will consider whether the not-for-profit is making these payments at the request of the agency head and whether the payments are for "City work." In other words, where the agency head has directed City employees to do what is "City work," has approved outside payment for this work, and

requested a waiver under Section 2604(e), the Board will generally see no conflict if the work is paid for by an affiliated not-for-profit rather than by the City itself.

Finally, the Board will want to be satisfied that the “affiliated” not-for-profit is one which, like the organizations considered in Advisory Opinion No. 92-34, exists primarily (or exclusively) to provide support for the agency’s programs for the benefit of the public at large. Not-for-profits already approved by the Board under Advisory Opinion No. 2003-4 as permissible beneficiaries of fundraising by public servants are almost certain to qualify. Thus, for example, if an agency head decides to use private funds raised by such an affiliated not-for-profit for staff salary increases or overtime pay as opposed to new computers, that is the same for Chapter 68 purposes as a decision to use City dollars for salary increases instead of computers.

Any such waivers will be conditioned on a requirement that, to the extent that the public servant is nominally working for the not-for-profit but in fact is doing his or her City job, the public servant will remain subject to all the other requirements of Chapter 68. For example, even as a “consultant” to an affiliated not-for-profit, a public servant may not hire his or her brother, or maintain a controlling interest in a vendor to the agency, or make appearances before the agency on behalf of private interests. In addition, public servants working in such consulting capacities will still be bound by the prohibition against disclosure of confidential information concerning the property, affairs, or government of the City which is obtained as a result of official duties and which is not otherwise available to the public. See Charter Section 2604(b)(4).

That does not mean that such waivers will be routinely or easily granted. The Board is less likely to grant waivers in the following circumstances, each of which it views as presenting

a conflict with the proper discharge of the public servant's official duties, in violation of Charter Section 2604(b)(2):

- An agency head approves payments from a not-for-profit to raise or supplement his or her own salary, or payments to subordinates for fundraising activities for that purpose.
- Public servants engage in fundraising on behalf of an affiliated not-for-profit, not to support a broad program which may include supplementing their own salaries as one component (which would be permissible), but rather for the specific purposes of increasing or supplementing their own compensation.
- Although ostensibly organized as an "affiliated" not-for-profit, the paying entity is in reality promoting private interests, not the purposes and interests of the City agency.
- The activities for which the public servant is being paid by the not-for-profit are not really "City work," but further other interests, such as (but not limited to) the public servant's own political aspirations or those of the agency head.
- The consulting arrangements or salary supplements appear to be merely a way to direct extra compensation to favored subordinates or political supporters.

In the two instant cases, while the payments would violate Charter Section 2604(b)(13) absent a waiver, the Board determines that the employees are not receiving the extra money for the purpose of securing private advantage for themselves, their agency head, or the private payer, but that they are indeed performing added services for the benefit of public at large. In the case of both DCA and the Public Advocate's Office, funding is being provided by a Board-approved, not-for-profit entity that is affiliated with the agency or office, for the sole purpose of facilitating City programs. At DCA, FOMA is assisting MFTA in expanding its hours and in collecting more materials, both activities designed to provide better City services to the public. At the Public Advocate's Office, an employee is providing additional services, beyond the normal work

day, in order to assist with informing the public about disaster planning for the City. In both cases, the funding for salaries is directed toward a specific City program, and the programs are funded through a closely affiliated not-for-profit organization already approved by this Board in accordance with Advisory Opinion No. 2003-4. Accordingly, pursuant to Charter Section 2604(e), the Board will grant waivers to authorize the payments from the affiliated not-for-profits for both the overtime of the DCA's employees and for the consulting work by the employee of the Public Advocate's Office.

#### Conclusion

It would violate Chapter 68, absent a waiver from the Board, for City employees to receive compensation from any person or entity other than the City for performing their City work, whether such compensation is denominated overtime pay, a salary supplement, a bonus, or payment for consulting work. The Board will consider applications for such waivers on a case-by-case basis, provided that the applicant has also submitted the written approval of the agency head. In the present case, the Board determines to grant waivers and permit such payments by two not-for-profit corporations closely affiliated with the City agencies in question, because it is satisfied that the purpose advanced by such payments is for the benefit of the public at-large.



Steven B. Rosenfeld, Chair

Monica Blum  
Angela Mariana Freyre  
Andrew Irving  
Jane W. Parver

Dated: October 5, 2005